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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/905,540	07/13/2001	Michael Dean McCutchan	8169M	3927

27752 7590 03/21/2003

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EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/21/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

175

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	09/905,540		MCCUTCHAN, MICHAEL DEAN	
	<b>Examiner</b>		<b>Art Unit</b>	
	Drew E Becker		1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 January 2003.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-6 and 17-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6 and 17-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                             | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)         | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ | 6) <input type="checkbox"/> Other: _____                                    |

## DETAILED ACTION

### *Information Disclosure Statement*

1. The information disclosure statement filed October 10, 2001 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because the Non Patent Literature references do not disclose a publication date. Applicant's attorney could not provide dates for these references when called on November 25, 2002. In order to speed along prosecution, it will be assumed that the publication dates of these references were sometime before the filing date of this application since they are described in the specification. This would equate to 102(a) or 102(b) publication dates. In order to speed prosecution, both rejections will be made.

### *Claim Rejections - 35 USC § 102*

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claim 1 is rejected under 35 U.S.C. 102(a or b) as being anticipated by Snack-a-Dip.

Snack-a-Dip teaches a kit comprising a canister containing a plurality of snack pieces, the snack pieces having an average projected area of about 1330 mm<sup>2</sup>, an attached tub containing a dip condiment, and the kit having a space efficiency of about 0.126 g/cm<sup>3</sup>.

Art Unit: 1761

The determination of the average projected area was by the method outlined by applicant on page 7 of the specification wherein three randomly selected whole chips were measured and averaged.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 2-3 and 17-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Snack-a-Dip in view of Yan Yan Snacks Meiji.

Snack-a-Dip teaches the above mentioned components as well as the canister having a sidewall, bottom wall, and top opening; a snack piece to dip ratio of 1.5; and a removable lid. Snack-a-Dip does not disclose a space efficiency greater than 0.20. Yan Yan Snacks Meiji teaches a kit comprising a canister containing snack pieces, a tub containing dip condiment, and a space efficiency of 0.228 (page 6, Table 1 of applicants' specification). It would have been obvious to one of ordinary skill in the art to incorporate the space efficiency of Yan Yan into the kit of Snack-a-Dip since both were directed to kits containing snack pieces and dip condiments, since it was commonly known to decrease shipping costs by packing goods together with less unused air space, and since space efficiencies of 0.228 were commonly known and used for food kits as shown by Yan Yan.

Art Unit: 1761

6. Claims 5 and 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Snack-a-Dip, in view of Yan Yan Snacks Meiji, as applied above, and further in view of Bezek et al.

Snack-a-Dip and Yan Yan Snacks Meiji teach the above mentioned components.

Snack-a-Dip and Yan Yan do not teach a triangular shape or stacked chips. Bezek et al also teaches a kit comprising a triangular canister containing stacked chips (column 7, line 15). It would have been obvious to one of ordinary skill in the art to incorporate the triangular shape of Bezek et al into the kit of Snack-a-Dip since both are directed to chip containers, since Snack-a-Dip already included triangular tortilla chips, and since triangular shaped canisters were commonly used for chip containers as shown by Bezek et al (column 7, line 16). It would have been obvious to one of ordinary skill in the art to incorporate the stacked chips of Bezek et al into the kit of Snack-a-Dip since both are directed to chip containers, since Snack-a-Dip already included tortilla chips, and since stacking the chips, as done by Bezek et al, would have provided a higher space efficiency as well as helping to prevent the chips from being broken during transport.

7. Claims 4 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Snack-a-Dip, in view of Yan Yan, as applied to claim 2 above, and further in view of Tostitos Chips & Salsa.

Snack-a-Dip and Yan Yan teach the above mentioned components. Snack-a-Dip and Yan Yan do not teach a snack piece area of greater than 1500 mm<sup>2</sup>. Tostitos Chips & Salsa teach kit comprising snack pieces and condiments wherein the snack piece area is 1590 mm<sup>2</sup> (page 6, Table 1 of applicants' specification). It would have been obvious

to one of ordinary skill in the art to incorporate the snack piece size of Tostitos Chips & Salsa into the kit of Snack-a-Dip since both are directed to kits for snack pieces and dip, since Snack-a-Dip already included tortilla chips, and since tortilla chips were commonly made with an area of  $1590 \text{ mm}^2$  as shown by Tostitos Chips & Salsa.

### ***Response to Arguments***

8. Applicant's arguments filed January 23, 2003 have been fully considered but they are not persuasive.

Regarding the lack of publication dates for the references cited in the IDS of paper no. 4, applicant contends that they were unable to provide this information since other companies produced the references. It is suggested that applicant call these companies and inquire about these dates, most companies keep quite accurate records of when they introduce new products onto the market, particularly well known brands and companies such as Tostitos and Oscar Mayer. These companies also normally have a consumer "hotline" which often has this information. Furthermore, this information is not "internal information" since it is merely the date when the company first started marketing or selling the product.

Applicant argues that Snack-a-Dip does not teach snack pieces having an average projected area of about  $1330 \text{ mm}^2$ . However, Snack-a-Dip does possess an average projected area of about  $1330 \text{ mm}^2$ . The determination of the average projected area was by the method outlined by applicant on page 7 of the specification wherein three randomly selected whole chips were measured and averaged.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

### **Conclusion**

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 703-305-0300. The examiner can normally be reached on Monday-Thursday 7am-5pm.


Art Unit: 1761

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1495.

Drew E Becker  
Examiner  
Art Unit 1761

March 6, 2003

  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**